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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JADE MICHAEL DEVINE, Defendant and Appellant.	E062812 (Super.Ct.No. RIF1300944) OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge. Affirmed.

Kenneth H. Nordin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jade Michael Devine appeals his conviction for making criminal threats, dissuading a witness and misdemeanor battery. He contends that the trial court's failure to instruct the jury to view his unrecorded out-of-court statements with caution requires reversal of his conviction on those counts. In the alternative, he contends that his attorney's failure to request the instruction deprived him of his constitutional right to the effective assistance of counsel. Finally, he contends that because the trial court failed to make an express finding on two "out-on-bail" sentencing enhancements, the sentences imposed for those enhancements must be vacated.

We conclude that defendant was not prejudiced by the omission of the cautionary instruction, and that the trial court implicitly found the enhancing allegations true. Consequently, we will affirm the judgment.

PROCEDURAL HISTORY

Defendant was charged with two counts of making criminal threats, one occurring on or about October 3, 2013, and the other occurring on or about December 29, 2012, in violation of Penal Code section 422 (counts 1 & 3); one count of dissuading a witness by force or threat of unlawful injury, in violation of Penal Code section 136.1, subdivision (c)(1) (count 2); and one count of misdemeanor battery, in violation of Penal Code section 242 (count 4). With respect to counts 1 and 2, the information alleged that defendant was on bail at the time of the offenses. (Pen. Code, § 12022.1.)

A jury convicted defendant on all counts and, as to count 2, found it true that he acted maliciously and used or threatened to use force in the commission of dissuading a witness. Defendant waived jury trial on the on-bail allegations.[1] The court imposed a term of five years in state prison.

Defendant filed a timely notice of appeal.

FACTS

On December 29, 2012, around 9:00 a.m., Paul Bessman, a security officer, was working in the parking lot of a Home Depot store in Riverside. Defendant walked up behind Bessman, pushed him to the ground, and punched and kicked him. While defendant kicked Bessman, he called Bessman a racial epithet and told him to go back to Jamaica where he came from. Bessman speaks with an accent but is not from Jamaica. He was born in West Africa.

Defendant told Bessman, "I'm going to kill this rent-a-cop" and "I know what . . . truck you drive." Bessman tried to get up while defendant punched and kicked him. A store employee pulled defendant away from Bessman. Defendant got into his vehicle and drove away. Bessman was scared because defendant had previously threatened to kill him.

[1] We will address below defendant's contention that the trial court did not make any findings as to the enhancements.

Bessman called the police. While speaking to Officer Hunt, who responded, he was nervous because he thought that defendant might return to kill him. Hunt testified that Bessman was so upset that he was stuttering and could barely speak.

Bessman had previously seen defendant on approximately 50 occasions, beginning about six to eight months before the December 29 attack. On those occasions, defendant cursed at Bessman, called him a racial epithet, and said things like "[r]ent-a-cop, you don't belong here. I'm going to kill you." Defendant also said that he knew the vehicle Bessman drove. Bessman did not know what triggered defendant's actions.

Bessman testified that as a result of defendant's attack, he suffered injuries to his head, neck, shoulders and back, resulting in soreness in his shoulders and back. A few months after the attack, Bessman quit his job and moved to Los Angeles because defendant continued to return to the parking lot to threaten him.

On October 3, 2013, Bessman was present in court to testify at the preliminary hearing in this case. Bessman was still afraid of defendant because defendant knew the vehicle Bessman drove, and Bessman believed defendant could harm or kill him. He took medication for the anxiety caused by defendant's actions.

When Bessman was in the hallway, returning to the courtroom from the restroom, defendant approached him, said he was going to kill him, and stated that Bessman was "a dead man walking." When Bessman reached the courtroom, he told the deputy that defendant had threatened him. An investigator for the Riverside County District Attorney's Office, Bruce Blanck, spoke with Bessman and detained defendant in the courtroom regarding the incident in the hallway. Defendant told Blanck, "I don't like

Black people, so what, that's my right." Blanck obtained the videotape of the incident in the hallway from courthouse security. The videotape was played for the jury.

LEGAL ANALYSIS

1.

THE OMISSION OF CALCRIM NO. 358 WAS NOT PREJUDICIAL

CALCRIM No. 358 states: "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

Defendant contends that at the time of his trial, trial courts had a sua sponte duty to give this instruction "in appropriate cases." He relies primarily on *People v. Diaz* (2015) 60 Cal.4th 1176 (*Diaz*). In that case, the California Supreme Court resolved a conflict in the Courts of Appeal regarding a trial court's duty to instruct using CALCRIM No. 358 in a prosecution for making criminal threats. The Court of Appeal in *Diaz* held that the trial court did have such a duty, while an earlier decision, *People v. Zichko* (2004) 118 Cal.App.4th 1055,[2] held that the instruction did not apply where the out-of-court statement constitutes the offense. (*Diaz*, at pp. 1183-1184.) The Supreme Court held, based on prior Supreme Court authority, that at the time of the defendant's trial,

[2] *People v. Zichko* was disapproved in *Diaz, supra,* 60 Cal.4th at p. 1187.

courts did have a sua sponte duty to give a cautionary instruction concerning "'any oral statement of the defendant, whether made before, during, or after the crime,'" including statements that constitute or form a part of the charged offense, as in the case of criminal threats. (*Id*. at p. 1186.) It held that the instruction is still applicable and should be given on request in an appropriate case. (*Id*. at p. 1189.) However, the court held, a trial court "is no longer required to give the instruction sua sponte." (*Id.* at p. 1181.) The court declined to decide whether its new rule applies retroactively. (*Id*. at p. 1195.) We will assume for purposes of this case that it does not apply retroactively because, as the court did in *Diaz*, we conclude that the omission of CALCRIM No. 358 was not prejudicial in this case. (*Diaz*, at pp. 1181, 1184-1195.)

Contrary to defendant's assertion, failure to give the cautionary instruction on extrajudicial statements is not a violation of federal due process warranting review under *Chapman v. California* (1967) 386 U.S. 18. Rather, the standard for state law error applies. (*Diaz, supra*, 60 Cal.4th at p. 1195.) Under that standard, reversal is required only if we conclude that there is a reasonable probability that the outcome of the case would have been more favorable to the defendant if the omitted instruction had been given. (*Diaz, supra*, at p. 1195; *People v. Watson* (1956) 46 Cal.2d 818, 835-836.)

The cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made. (*Diaz, supra*, 60 Cal.4th at p. 1195.) Accordingly, "'courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the [statements] were repeated accurately.' [Citation.]"

(*Ibid.*) Omission of a cautionary instruction concerning a defendant's unrecorded out-of-court statements may be prejudicial if there are inconsistencies in testimony about what the defendant said. (*Id.* at pp. 1195-1196.)

There were no such inconsistencies in this case. The evidence as to the first charged incident of making criminal threats was conflicting as to some details, such as how the physical assault occurred. Bessman testified that he was thrown to the ground and punched and kicked, and that he suffered pain in his shoulders and neck. Officer Hunt, who took Bessman's statement, testified that Bessman told him that defendant instead grabbed him around the neck but that Bessman was able to push him away. He checked Bessman for physical injuries but saw none.[3] With regard to the statements Bessman attributed to defendant, however, there was no significant difference between Bessman's testimony and Hunt's: Defendant called Bessman a racial epithet and threatened to kill him, and said that he knew what vehicle Bessman drove. Defendant did not testify and therefore did not contradict Bessman's testimony, and no other witness to the incident testified. Bessman's brother testified that he had seen Bessman making "antagonizing" gestures toward defendant on several dates after the incident, but he did not witness the incident. Similarly, there was no evidence to contradict Bessman's testimony that defendant threatened him in the courthouse hallway in the second incident. In the absence of any conflict in the evidence as to what defendant said or even a denial that he made the statements attributed to him, it is unlikely that an instruction to view

[3] This is not a conflict, because Bessman did not say he suffered any abrasions or contusions or other visible injuries. Rather, he said he had pain in those areas.

defendant's statements with caution would have caused jurors to question whether the statements were made. (*Diaz*, *supra*, 60 Cal.4th at pp. 1195-1196.)

Furthermore, the instructions provided by the trial court concerning witness credibility informed the jury of the need to evaluate all of the testimony, from all of the witnesses, for possible inaccuracies and to determine whether the statement was in fact made. The jury was instructed with CALCRIM No. 226, which sets out the numerous factors the jury may consider in deciding whether a witness's testimony is credible. "'[W]hen the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, we have concluded the jury was adequately warned to view their testimony with caution.'" (*Diaz*, *supra*, 60 Cal.4th at p. 1196; see *People v. Carpenter* (1997) 15 Cal.4th 312, 392 [finding trial court's instruction on witness credibility prevented prejudice where there was no evidence that the statements were not made].)[4]

For these reasons, we hold that there is no reasonable probability of an outcome more favorable to defendant if CALCRIM No. 358 had been given.

For the same reasons, even if we assume that trial counsel should have requested the instruction, we reject defendant's contention that this was prejudicial. "The standard for determining ineffective assistance of counsel is well established. A defendant must demonstrate that (1) his attorney's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's

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[4] *People v. Carpenter*, *supra*, 15 Cal.4th 312, was abrogated in part by *Diaz*, *supra*, 60 Cal.4th at page 1190, but cited by the court as authority on this point. (*Diaz*, at p. 1196.)

unprofessional errors, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 . . . .) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Id.* at p. 694.) Even assuming arguendo that defense counsel's performance, in failing to request the cautionary instruction, fell below an objective standard of reasonableness, it is not reasonably probable that, but for counsel's failure, the result of the trial would have been different." (*People v. Dickey* (2005) 35 Cal.4th 884, 907.)

2.

THE TRIAL COURT'S FAILURE TO MAKE AN EXPRESS FINDING ON THE ON-BAIL ENHANCEMENTS DOES NOT REQUIRE VACATING THE SENTENCES IMPOSED FOR THE ENHANCEMENTS

The information alleged that counts 1 and 2, making criminal threats and witness intimidation alleged to have occurred in the courthouse, were committed while defendant was out on bail. Defendant waived a jury trial on the enhancements, and the court stated that it would address the enhancements at the sentencing hearing. At the sentencing hearing, the court did not discuss the enhancements or make an express finding as to the truth of the allegations.[5] The court did, however, impose a consecutive term of two years

[5] The clerk's transcript states that the court found the allegations true. Where there is a conflict between the reporter's transcript and the clerk's transcript as to the pronouncement of sentence, the reporter's transcript prevails. (*People v. Mesa* (1975) 14 Cal.3d 466, 471, superseded on other grounds as stated in *People v. Turner* (1998) 67 Cal.4th 1258, 1268.)

for the on-bail enhancement on count 2 and stayed the sentence on count 1 pursuant to section 654.

Defendant now contends that because the trial court did not expressly make true findings, the sentences on the enhancements must be vacated. He argues the court's failure to make a finding results in a silent record on the point and constitutes a "not true" finding.

Defendant relies on *People v. Gutierrez* (1993) 14 Cal.App.4th 1425. In that case, the Attorney General argued that the trial court erred in staying the sentence on a prior serious felony conviction alleged pursuant to section 667. The Court of Appeal declined to address the issue because of a "more fundamental defect," specifically that the trial court had failed to make any finding on the allegation, as required by section 1158. (*Gutierrez*, at pp. 1439-1440.) Based on *People v. Eppinger* (1895) 109 Cal. 294, the court in *Gutierrez* held that the trial court's failure to make a finding is the same as a finding of "not true." Accordingly, it affirmed the judgment. (*Gutierrez*, at pp. 1439-1440.)

The controlling authority on whether special allegations involving "silent records" can be deemed to have been impliedly found true, however, is *People v. Clair* (1992) 2 Cal.4th 629 (*Clair*). (*People v. Chambers* (2002) 104 Cal.App.4th 1047, 1050 (*Chambers*).) In *Clair*, the California Supreme Court addressed a concession by the People that the defendant's serious felony enhancement had to be set aside because no finding on the underlying prior conviction allegation had been made. The defendant stipulated that the trial court could consider the People's evidence on the prior, including

certified copies of the conviction. Thereafter, the issue of whether the prior allegation was true or not was argued to the trial court. The trial court never rendered an express finding about the prior, but at sentencing the trial court expressly imposed the pertinent enhancement. The Supreme Court held: "At sentencing, the court impliedly—but sufficiently—rendered a finding of true as to the allegation when it imposed an enhancement *expressly* for the underlying prior conviction. Contrary to defendant's claim, there is no failure of proof. Neither is there any reason to vacate the enhancement—and less reason still to disturb the penalty of death." (*Clair*, *supra*, 2 Cal.4th at p. 691, fn 17.)

The same result was reached in *Chambers*, *supra*, 104 Cal.App.4th 1047. In that case, the reviewing court found that a true finding was implied and acceptable even though the trial court failed to expressly find that a firearm use allegation was true. The Court of Appeal rejected the notion "that the trial court's failure to make an express finding constitutes a 'silent' record, which operates as a finding that the special allegation is not true." (*Id*. at p. 1050.) Citing *Clair* as the controlling authority, the court in *Chambers* found that the defendant's argument was inconsistent with the California Supreme Court's holding. (*Chambers*, at p. 1050.) The court stated, "Here the record is not 'silent' as the oral pronouncement of judgment 'speaks' to impliedly affirm the truth of the use of a firearm allegation." (*Ibid*.)

Like the court in *Chambers*, we are bound by *Clair, supra*, 2 Cal.4th 629. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Here, although the court made no express finding on the enhancements, its oral pronouncement of judgment included imposition of sentence on the on-bail enhancements. Under these circumstances, the imposition of sentence constitutes an implied finding that the on-bail allegations were true. (*Clair*, at p. 691, fn. 17.)

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.